NO. 48294-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER WILLIAM OLSEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 14-1-00750-9

CORRECTED BRIEF OF RESPONDENT

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5. Did the trial court properly exercise its discretion when it allowed the proper impeachment of Nicole Clark and, even if the trial court did err, was any error harmless when the defendant testified and admitted that he shot the victim? (Appellant's Assignment of Error #6)

6. Has the defendant failed to show that he is entitled to relief under his Personal Restraint Petition when he has not shown that the "new evidence" would have changed the result of the trial, it would be impeaching, and he has not made a prima facie showing for even a reference hearing? (Appellant's Assignment of Error #1; raised in Personal Restraint Petition)

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B. STATEMENT OF THE CASE.

1. Procedure

On May 8, 2015, Christopher Olsen, hereinafter "defendant" was charged with murder in the first degree (intentional murder), murder in the first degree (extreme indifference) and murder in the second degree (felony murder). CP 83-84. Each count also included a firearm sentencing enhancement allegation. *Id.* On September 9, 2015, both parties appeared for trial. CP 475-497.

At the conclusion of the trial, the defendant was found guilty of all counts. CP 475-497; 536-543. At sentencing on October 23, 2015, the court entered an order vacating counts II and III on double jeopardy grounds, and sentenced the defendant as to count I (intentional murder in the first degree) only. CP 1685-1686. The defendant received a sentence of 608 months. CP 1687-1700.

On November 19, 2015, the defendant timely filed a notice of appeal. CP 1707-1721. The defendant filed a CrR 7.8 motion on the basis of "newly discovered evidence" on September 20, 2016. CP 1736-1760. That motion was transferred to this court as a personal restraint petition

and was consolidated with his direct appeal. CP 1761-1762. The State's consolidated response follows.

2. Facts

Larry Brown testified that he is the general manager for U-Haul in North Auburn. RP 587. Brown indicated that the defendant rented a U-Haul pickup truck on February 15, 2014. RP 595. Nicole Clark, the defendant's girlfriend, rented a second U-Haul pickup truck the next day. RP 598, 691, 908-910, 1650. After the murder, police were able to locate the pickup truck that Clark had rented. RP 1341. It had not been rented out since Clark. RP 1342. The truck had what appeared to be bullet holes in the front passenger side mirror and both license plates were missing. *Id.*

A childhood friend of the defendant, Douglas Nelson, saw the defendant in January and/or February of 2014. RP 681. At that time, the defendant drove a black pickup truck. RP 682. Nelson indicated that he had observed the defendant with a .38 mm handgun. RP 684.

Nelson also knew Robert Ward, who also went by the nickname "G." RP 683, 850. Ward and the defendant met at Nelson's home on or about February 15, 2014. RP 683-684. At that time, the defendant was attempting to sell some heroin. RP 685. Ward knew somewhere where the defendant could sell his heroin, so the two men left Nelson's home

together. RP 686. Later that day the defendant returned to Nelson's home without Ward. *Id.* The defendant indicated that Ward had stolen his truck. RP 687. Nelson told the defendant that he needed to be careful because Ward had shot and killed someone in 2009. RP 700. The next day, Nelson learned that Ward had been shot. RP 691. The defendant spoke to Nelson and indicated to him that he was going to leave town. RP 691.

On February 15, 2014, the defendant called the police to report that his vehicle had been stolen. RP 826. Officer Jones and Officer Byers responded to the call and attempted to contact the defendant, but were unable to locate him. RP 824-826. Four hours later, Officer Jones and Officer Byers were again dispatched to make contact with the defendant and were able to do so. RP 831-832. The defendant told police that he had been at the casino earlier in the day and that his vehicle had broken down. RP 833. The defendant stated that he left his vehicle, a Dodge Ram, at the casino and rented a U-Haul pickup truck, which he used to return to the casino. RP 833, 2095. The U-Haul pickup truck was then stolen from the casino parking garage. RP 833-834. The defendant identified the suspect as someone he knew as "G," the victim's nickname. RP 683, 686, 837, 1039-1040.

Presley Lind testified that she and the defendant would meet for drug use and sex. RP 707. On February 16, 2014, the defendant called Lind and asked her if she knew of someone in the Spanaway area who sold heroin named Robert Ward. RP 714, 716. Lind asked two other people—Joseph Kaplin and Nathan Stevenson[1]—if they knew of Ward. RP 717. Kaplin was told that a friend of Lind's had his car stolen and that it matched the description of a car that Stevenson and his friend, Ward, were trying to sell on Craigslist. RP 758, 862. Lind provided Stevenson a description of the possible suspect who had the stolen car, and Stevenson recognized him as Ward. RP 864. Both Kaplin and Stevenson indicated that they knew Ward. *Id.* Lind relayed to the defendant that Kaplin and Stevenson knew Ward. RP 719. The defendant told Lind that Ward had "jacked him" and wanted Lind to facilitate a meeting with him and Ward. *Id.* Stevenson told Lind that he had talked to Ward and that he was able to tell her where the car was located. RP 866. Stevenson and Kaplin were going to receive heroin as payment for helping the defendant locate Ward. RP 759.

Stevenson made arrangements to meet Ward at the TacoTime. RP 867. Stevenson, Kaplin and Ward met at the Safeway at 112th and

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[1] Nathan Stevenson was also known by the nickname "Nasty Nate." RP 847, 1152.

Canyon. RP 870. From that point, Stevenson told Ward that he could meet a potential drug buyer at the Safeway/TacoTime location[2] at 176th and Canyon. RP 870, 877. Stevenson and Kaplin were in one car and Lind was in a second car. RP 725, 760. When Stevenson and Kaplin arrived at the first Safeway, Stevenson got out of his car and got into Ward's car. RP 761, 872. Ward gave Stevenson heroin for brokering the drug deal. RP 874-875. When Stevenson returned to his own car, he had heroin. RP 763. Stevenson told Kaplin that Ward had a gun inside his car. RP 789. Stevenson and Kaplin smoked the heroin and then drove off. RP 764-765.

Stevenson had told Ward that he had arranged for a drug deal with his cousin at the TacoTime on 176th and Canyon, but that was a rouse in order to get Ward to bring the car to that location for the defendant to recover. RP 791-792, 876-877. As part of the rouse, there was no buyer for Ward to sell drugs to, but rather Lind was going to meet him there. RP 877. Stevenson did not tell Ward that Lind was going to be there but told Lind that he was en route to her location. RP 878-880.

On their way back to their house, Stevenson recognized the car that Ward had stolen from the defendant, so they pulled into the

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[2] The Safeway was in front of the TacoTime. RP 767. Ward's vehicle was located in front of the TacoTime. RP 884.

Safeway/TacoTime at 176th and Canyon to see if Lind was able to recover the car. RP 765, 882. Stevenson and Kaplin wanted to see what was happening there. RP 882. They parked in the drive-thru and waited. RP 887. Stevenson called Lind to inform her that target car—Ward's—was at the location. *Id.* Stevenson and Kaplin stayed in that area observing the car for approximately 20 minutes. RP 771. They were about to leave when they saw an ambulance and police. RP 771, 889. They did not see Ward get shot. *Id.*

Lind, Kaplin, Stevenson, and the defendant converged at the agreed upon meeting location at a Safeway shopping center located at 176th and Canyon. RP 724. When Lind arrived, she saw a white U-Haul pickup truck, which the defendant had told her that he would be driving, but no one was inside that vehicle. RP 725. Lind contacted the defendant, who stated that he wanted to meet up with Lind. *Id.* Lind agreed to meet the defendant at a nearby gas station. *Id.*

Lind went to the gas station and saw that the defendant was the passenger in a black SUV. RP 726. Lind did not recognize the driver of the SUV. *Id.* The defendant got into Lind's car and she drove him to a nearby TacoTime where Ward was supposed to have been. RP 728-730.

Ward was at the Safeway/TacoTime. RP 735. The meeting was at approximately 5:30 to 6:00 p.m. RP 1710-1711. After seeing Ward, the

defendant asked Lind to take him back to his U-Haul vehicle. *Id.* Lind then returned to the Safeway/TacoTime because she had been asked by Stevenson and Kaplin to give one of Ward's passengers a ride. RP 737. The passenger needed a ride because the car that was being driven by Ward was supposed to be going back to the defendant. *Id.* Upon her arrival the second time, Lind was able to determine that Ward had two other passengers in his car. RP 739. She then observed the defendant in his white U-Haul approach Ward's vehicle. *Id.*

Ward asked Lind who was in the approaching truck. RP 742. Lind responded by telling Ward that his passengers might want to get out of the car because Lind believed that Ward's car was going to be taken by the defendant. *Id.* Ward pulled out of his parking space at a high rate of speed with the defendant right behind him. *Id.* The last Lind saw, the defendant was following Ward. RP 744-745. Lind got back in her car and went to Kaplin's house. RP 746.

The passengers in Ward's car were Bryant Ward[3] and Ricky Pederson. RP 1101. Bryant was in the backseat and Pederson was the front seat passenger. RP 1103, 1151. Ward was driving. RP 1104. They were going to meet Nate Stevenson at 112th and Canyon. RP 1152. They

[3] Because the victim and Bryant Ward both share the same last name, Bryant Ward will be referred to by his first name and the victim will be referred by his last name to avoid confusion.

met Stevenson, who got into Ward's vehicle. RP 1152. The men in Ward's car sold Stevenson heroin and Stevenson told them that he had someone at the 176th and Canyon Safeway who wanted to meet up with them. RP 1153.

Ward drove to the Safeway/TacoTime. RP 1153. At the Safeway/TacoTime, Lind approached Ward's car and Bryant heard her tell Ward that his friends might want to get out of the car. RP 742, 1108, 1156. Neither Ward nor his passengers knew Lind, and Pederson told Ward to leave. RP 1108, 1156.

Bryant saw a U-Haul truck pull up behind them. RP 1109. Ward, Bryant and Pederson were still in Ward's car. RP 1110. In response to the truck, Ward quickly pulled out of the parking lot. RP 1109-1110. Bryant believed that gunshots were coming from the U-Haul truck and the gunfire was following them. RP 1111. Bryant heard a dozen gunshots from which he attempted to take cover by crouching down. RP 1111-1112. Pederson knew the car was hit with bullets several times. RP 1157, 1208. When Bryant looked up, he could see that Ward's car was on the wrong side of Canyon Road. RP 1112.

The truck continued to pursue Ward's car, shooting at it. RP 1158, 1160. Pederson saw the driver of the U-Haul truck roll down the driver's side window. RP 1218. William Gamm, a nearby motorist, observed the

driver of the U-Haul truck shooting. RP 1232. Gamm was able to determine that the shooter was trying to aim out of the window for a "good, accurate shot." RP 1233. It appeared to Gamm that the shooter was acting in a cold, intentional way consistent with wanting to hurt something. *Id.* Caroline Bennet saw a car being pursued by a truck and heard what sounded like gunshots. RP 1262-1263. Similarly, Verne Yates saw a sedan being followed by a white truck. RP 1320.

Ward's car started to slow down. RP 1115. The car had slowed enough that Bryant was able to jump out. *Id.* Bryant fled through a field. RP 1115, 1163. Ward hit a telephone pole in the oncoming lane of traffic. RP 1160. Pederson looked over at Ward and saw him leaning over the steering wheel with a hole in the right side of his head. RP 1160-1161.

By the time Ward was taken to the hospital, he still had a pulse but was unresponsive. RP 1512-1514. Physicians determined Ward would not survive a surgery to address the gunshot wound to his head. RP 1522. It was determined that Ward had suffered brain death. RP 1526. Dr. Clark, the Pierce County Medical Examiner, determined that the cause of Ward's death was a gunshot wound to the head. RP 1537-1538, 1564.

After his death, the bullet was removed from Ward's head and provided to Terry Franklin, a forensic scientist at the Washington State

Patrol Crime Laboratory. RP 1449, 1463. Franklin was able to determine that the bullet came from a gun in the .38mm family. RP 1464.

At approximately 6 p.m. on the day of the murder, Ashlee Baker was driving home. RP 1082. She observed a car that had crashed at 176th and Canyon. RP 1083. The front passenger—Pederson—from the crashed car was yelling and screaming for help. RP 1087, 1141. Pederson entered Baker's vehicle while she was at a stoplight and was almost hysterical. RP 1067-1068. He told her that his friend had just been shot and he thought his friend was dead. RP 1088, 1165. Baker called the police and took Pederson home. RP 1088-1089.

Deputy Swalander and Deputy Moss arrived at the scene of Ward's crashed car. RP 1126, 1576. It did not appear as if the car had been badly damaged in a crash, but had some front end damage. RP 1127. The passenger side window had a hole in it and was cracked. RP 1128, 1578. The sole occupant in the vehicle at the time was Ward. *Id.* Ward was slumped over in the driver's seat and was unresponsive. RP 1128, 1578-1579. Deputy Swalander observed a gunshot wound about Ward's right eye. RP 1128-1129.

At a later time after Ward's murder, the defendant told Lind that she needed to report that she had seen Ward with a gun so that the defendant could claim he acted in self-defense. RP 749-750. Lind

testified that she did not see Ward with a gun. *Id.* Bryant never saw a gun in Ward's vehicle. RP 1114. When Ward's body was removed, police observed a gun on the driver's seat. RP 1132. Pederson saw Ward with the gun when he was being shot at but Ward was hit before he was able to raise it higher than his lap. RP 1162. Ward never pointed or fired his weapon. RP 1162-1163. When Ward's gun was recovered by the police it was determined there was not a round in the chamber. RP 1607-1608.

Detective Ryan Salmon, the cellular phone investigator for the Pierce County Sheriff's Department, examined Ward's cell phone. RP 926, 944. Detective Salmon determined that Ward had received a call from a contact named "Nasty Nate," also known as Nathan Stevenson, in the time leading up to the shooting. RP 946. Detective Salmon was able to connect the number for Stevenson to Kaplin as well, and was able to determine that the phone was in the area of 176th and Canyon at the time of the shooting. RP 953-954. Detective Salmon also concluded that the cell phone associated with Lind was in contact with the phone connected to Stevenson/Kaplin. RP 957.

Detective Salmon reviewed the phone records for "Christopher Allsen." RP 963. Detective Salmon concluded that "Christopher Allsen" was the defendant. RP 1035-1036. According to phone records, "Christopher Allsen" was at 160th and Canyon at the time of the shooting.

RP 965. Detective Salmon discovered calls from "Christopher Allsen" to Ward and Lind. RP 960-967.

When the defendant was arrested, a red Samsung phone was recovered. RP 996. An examination of the phone revealed that a search had been conducted on the Washington's Most Wanted website for a shooting that occurred at 176th. RP 997. The history also revealed Google searches for Christopher Olsen and the shooting at 176th and Canyon. *Id.*

The defendant testified on his own behalf. RP 2067. He was aware that Ward sold drugs and believed Ward to be dangerous. RP 2068. On February 15, 2014, he and Ward met at a McDonalds so that the defendant could purchase methamphetamine from Ward. RP 2069-2070. The defendant then asked Ward to help him get some items out of his personal truck, a Dodge Ram, that was parked at the Muckleshoot Casino. RP 2070, 2095. The defendant and Ward drove to the casino in the U-Haul truck. RP 2071. The defendant stated that he got into his Dodge Ram, got it started, and pulled around, when he discovered that Ward and the U-Haul were gone. RP 2072. He called the police to report the U-Haul stolen. RP 2073.

The defendant contacted Lind because he knew she had been involved with drugs and might know Ward. RP 2076. Lind coordinated a meeting between Ward and the defendant. RP 2077. The defendant drove

to the meeting place using a second U-Haul truck rented by his girlfriend, Nicole Clark. RP 2077-2078. The defendant got into Lind's car and she made a call to Nate Stevenson. RP 2079. Stevenson told the defendant that Ward was going to be by the TacoTime. RP 2080. The defendant and Lind drove together to the TacoTime, where she indicated the vehicle driven by Ward. RP 2080. The defendant asked Lind to drive him across the parking lot to his U-Haul. RP 2081. At the time, the defendant brought his weapon with him and pulled behind Ward. RP 2082. The defendant recognized him as the person who stole the U-Haul. RP 2131. The defendant testified that he wanted to get back the money, his checkbook and the rental U-Haul. RP 2082, 2095, 2128. Ward drove off and, instead of calling the police, the defendant gave chase. RP 2082-2083, 2133. The defendant admitted that he pursued Ward. RP 2134.

The defendant admitted to firing out of his passenger window after claiming that he saw Ward's gun. RP 2085. He stated he was not aiming at Ward. *Id.* The defendant stated that he fired twice, initially, because he did not want Ward firing at him. RP 2135. The defendant heard other cars honking. RP 2139. Once Ward crossed over into oncoming traffic, he ended up behind the defendant's vehicle. RP 2140. The defendant then fired three or four more shots over his shoulder. RP 2143. The

defendant stated that he continued to "get away" and did not call the police that day or the next. RP 2143-2144.

After the shooting, the defendant threw his gun away. 2145-2146. He changed his telephone number. RP 2146. The defendant punched out the ignition on the U-Haul truck he was driving. RP 2147. When asked if the damage he caused to the truck was to make it look like the U-Haul had been stolen, the defendant stated that he "panicked" and that he did not know what to do. RP 2147-2148. The defendant then left the area to go to Deer Park, Washington. RP 2148. The defendant then proceeded east into Idaho, stating that he wanted to visit a friend. RP 2149. The defendant admitted that he shot and killed Ward. RP 2094.

C. ARGUMENT.

1. WPIC 16.04, THE FIRST AGGRESSOR INSTRUCTION, WAS PROPERLY GIVEN IN THIS CASE AS EVIDENCE ESTABLISHED THE DEFENDANT INITIATED THE VIOLENT ENCOUNTER THAT ENDED WITH HIM SHOOTING AND KILLING THE VICTIM.

"[G]eneral[ly] … self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation…." ***State v. Riley***, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). "An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *Id.* at 910 (*citing* ***State v. Davis***, 119 Wn.2d

657, 666, 835 P.2d 1039 (1992)). Claimed instructional error is reviewed for an abuse of discretion. *See* ***State v. Walker***, 136 Wn.2d 767, 771-72, 966 P.2d 833 (1998). *De novo* review is applied to determine if there was sufficient evidence for an aggressor instruction. ***Riley***, 137 Wn.2d at 909.

Appellate courts are duty bound to apply a valid statement of state law pronounced by the State Supreme Court. ***Matia Contractors, Inc. v. City of Bellingham***, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008). Our Supreme Court approved WPIC 16.04 as an accurate statement of state first aggressor law. ***Riley***, 137 Wn.2d at 908. Washington courts only overturn precedent if it is clearly shown to be incorrect and harmful. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599, 604 (2006). Those constraints prevent incautious action. *Id.* Courts typically will not reach core questions of judicial business "unless … indispensably involved in a … litigation. And then, only to the extent … so involved." ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 594, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

Aggressor instructions are properly given when there is conflicting evidence regarding whether the defendant's conduct precipitated the fight. ***Davis***, 119 Wn.2d at 665-66. That evidence is reviewed *de novo*, but in the light most favorable to the party who sought the instruction. *Id.* There need only be some evidence a defendant was the aggressor to meet this

burden. *Id.* The act of provocation need not be the striking of a blow, so long as it was related to the assault to which self-defense was claimed. *Id.* A defendant's history of assaultive behavior toward the victim provides relevant context from which to assess whether an intentional act at issue was reasonably likely to provoke a belligerent response. *Id.*; *see also* ***State v. Allery***, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

In ***Riley***, *supra*, the defendant shot the victim for insulting him and threatening to shoot him. ***Riley***, 137 Wn.2d 904 at 906-907. At trial, the defendant testified that the victim was reaching for his gun, so he shot him in self-defense. *Id.* Approving the use of WPIC 16.04, the court held:

> . . .[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight.

Id. at 909 (internal citations omitted).

The court, citing 1 *Wayne R. LaFave & Austin W. Scott, Jr. 's Substantive Criminal Law*, §5.7 (1986), held:

> [T]he reason one generally cannot claim self-defense when one is the aggressor is because "the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful force, for self-defense."

Id. at 657-58.

Similarly, in ***State v. Wingate***, 155 Wn.2d 817, 122 P.3d 908 (2005), the court approved the use of WPIC 16.04. In ***Wingate***, a dispute arose between Stephen Park and James Koo. *Id.* at 818-819. After being informed that Park was on his way to his residence, Koo's friends—including the defendant—gathered at Koo's home. *Id.* The defendant was armed with a handgun. *Id.* During trial, the defendant testified that Park obtained a sawed-off shotgun from his car, pumped (cocked) the firearm, and put it back into the open trunk of a car. *Id.* at 819. Another witness testified that Park appeared to put something in his waistband. *Id.*

The defendant testified that he believed Park was getting out of control, so the defendant pulled out his gun to get others away from the trunk of the car. *Id.* The defendant removed the shotgun from the trunk. *Id.* The defendant admitted that he did not see a gun, but believed Park was reaching for one, so he shot Park. *Id.* at 820. Park testified that he had his hands raised, palms up, at the time the defendant shot him. *Id.*

Affirming the use of WPIC 16.04, the court held that such instruction was appropriate when there was conflicting testimony about what provoked the altercation. *Id.* at 822-823. In this case, the State

proposed, and the Court gave, the pattern aggressor instruction, WPIC 16.04, approved by the Supreme Court in ***Riley*** and the Court of Appeals in ***State v. Cyrus***, 66 Wn. App. 502, 509-10, 832 P.2d 142, *review denied*, 120 Wn.2d 1031 (1993). CP 498-535 (instruction #30); ***Riley***, 137 Wn.2d at 908, 913-14. Such an instruction was appropriate in this case. Evidence was elicited that Ward was lured to 176th and Canyon under the ruse of a supposed drug deal. Lind attempted to get Ward's passengers out, presumably because she knew they could be collateral damage by the defendant. The defendant then elected to pursue Ward as Ward attempted to flee the area. Both Ward and the defendant were traveling at a high rate of speed.

Thereafter, the defendant elected to continue to pursue Ward through the crowded streets. The defendant, by his own admission, fired shots out of his vehicle multiple times and eventually struck Ward in the head resulting in his death.

The defense theory below was that of self-defense. WPIC 16.04 was necessary and appropriate. Without it, the jury would have not been fully instructed on the law of self-defense. The defendant correctly asserts that WPIC 16.04 is warranted in one of three different scenarios: (1) where the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the

defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon. ***State v. Stark***, 158 Wn. App. 952, 960, 158 P.3d 433, *review denied*, 171 Wn.2d 1017 (2011), *citing* ***State v. Anderson***, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). The defendant appears to concede that the first two criteria are met. BOA, page 25. In reality, all three of the criteria are met. The defendant provoked the fight by luring the victim to a specific location, then gave chase to the victim while firing his weapon at the victim. Pederson testified that Ward never raised his gun, supporting the theory that the defendant was the first to draw a weapon. RP 1162.

The defendant now asserts that there was a "clear break" in the action during the rolling firefight down Canyon Road. BOA, page 25. There was, however, no "clear break" and the defendant provides no law to support such a claim. This car chase took place in a matter of mere minutes, with the defendant firing in both a position ahead of and behind Ward. At no point did the defendant call police, disengage from the car chase, or stop firing.

In ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (2012), the defendant was burglarizing a home when the homeowner's neighbor (the victim) appeared, armed with a gun. *Id.* at 613. The defendant grabbed the victim's arm and held his gun to the victim's stomach. *Id.* The

defendant backed the victim out of the residence and told him that he had not taken anything from the residence. *Id.* The defendant then pointed his gun down and released his grip on the victim. *Id.* The defendant stated that the victim then shot at him and in response the defendant shot at the victim, knocking him onto a couch. *Id.* The victim aimed at the defendant again and the defendant again fired more shots, killing the victim. *Id.* The court held that the defendant had not withdrawn from the confrontation and that, even though he was attempting to flee, the burglary was still in progress. *Id.* at 617. The court held:

> It is the rule that one who was the aggressor or who provoked the altercation in which he killed the other person engaged in the conflict, cannot successfully invoke the right of self-defense to justify or excuse the homicide, unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action ....

Id. at 617, *citing* ***State v. Craig***, 82 Wn.2d 777, 783 514 P.2d 151 (1973), *accord* ***State v. Wilson***, 26 Wn.2d 468, 480, 174 P.2d 553 (1946).

In this case, the defendant took no action to desist from the car chase. He continued to shoot at the victim and those around him. At no time did he exhibit any evidence that would have signaled to Ward that he was desisting, such as turning onto another road, slowing down, or calling the police. On the contrary, all evidence suggests that that defendant was enraged that Ward had stolen his vehicle and he wanted revenge. Because

the defendant did not disengage from the altercation, and the court properly instructed the jury using WPIC 16.04.

2. THE TRIAL COURT PROPERLY DENIED THE ADMISSION OF CELL SITE SIMULATOR EVIDENCE WHEN NO SUCH TECHNOLOGY WAS USED TO LOCATE OR APPREHEND THE DEFENDANT IN THIS CASE AND THE TRIAL COURT PROPERLY CONCLUDED THAT THE DEFENDANT LACKED STANDING TO RAISE SUCH A CLAIM.

a. Facts

On May 19, 2015, the defense filed a motion to suppress and dismiss based on the use of cell site simulator (Stingray) technology. CP 115-272. On June 16, 2015, the State filed a response. CP 273-302. The State later filed attachments to its response brief. CP 303-309. The attachment included affidavits from Tacoma Police Detective Terry Krause, Tacoma Police Detective Scott Shafner, and Pierce County Sheriff Detective Sergeant John Delgado. *Id.* Each affidavit affirmed that a cell site simulator or Stingray was not used to locate the defendant. *Id.*

On June 29, 2015, the parties appeared to address the defendant's discovery request for evidence concerning cell site simulation devices or Stingray. 6/29/15 RP 1-2. The defense had been requesting some additional discovery regarding Stingray. 6/29/15 RP 1. At that time, the

defense acknowledged that they had been informed by the State that no Stingray device was used in respect to the defendant. 6/29/15 RP 2. The State represented that the Tacoma Police Department had intended to use the Stingray device to locate the defendant. 6/29/15 RP 18. In fact, the Tacoma Police requested that they be allowed to take their Stingray device to the Spokane area to attempt to locate the defendant and that request was denied by the detective's chain of command. *Id.* Law enforcement went to Spokane without the device. *Id.*

On August 19, 2016, the defense again addressed a request for discovery for any electronic surveillance associated with the case. 8/19/16 RP 10. The State again responded that electronic surveillance, specifically the Stingray technology, was not used to locate the defendant. 8/19/16 RP 13. The Stingray technology was used to locate another person involved in the case—Nathan Stevenson. *Id.* The State referenced the affidavits from law enforcement stating that at no time did they take the Stingray device to Eastern Washington (where the defendant was located) or even outside of Pierce County. CP 303-309; RP 13. The State reiterated that the Stingray technology was not used to locate the defendant in the Spokane or Post Falls areas. *Id.* The State further represented that it had contacted the police department in Post Falls, Idaho and determined that such a device was not used by them either. *Id.* Finally, the State indicated

that he had been informed by the U.S. Marshal that the individual who is trained on the Stingray device was off the day of the defendant's arrest. RP 14. The State affirmed that the Stingray device was not used on February 21, 2014 in an effort to locate the defendant, nor was it used to locate the defendant at the time of his arrest on February 22, 2014. *Id.*

The trial court agreed with the State that the defendant lacked the standing to assert the privacy rights of Nathan Stevenson and denied the defendant's motion to suppress and dismiss. RP 80.

b. Argument[4]

i. There is an insufficient record at trial on this topic so the Court should decline to address this issue.

The defendant asserts that "[the] Stingray used in this case is a type of type [sic] of cell site simulator device." BOA, page 28. This assertion is not supported by a citation to the record. There appears to be no record

[4] In one of the defendant's supplemental pleadings that was filed on October 21, 2016—well after his trial and sentencing—the defendant included an affidavit signed by himself expressing that he had additional information about the alleged used of Stingray technology but did not disclose such information during his trial. To the extent this court considers his declaration, it appears to be entirely self-serving, not credible, and, at best, does not constitute "newly discovered" evidence because by the defendant's own admission this information was known to him at the time of his trial and he elected not to disclose it or present testimony regarding it. As such, this court should decline to consider it.

at trial of what "Stingray" is, if there are different types, how they are used, what they do, or anything else[5].

The Court should not consider this issue as there is an insufficient record. "A party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue." ***State v. Garcia***, 45 Wn. App. 132, 140, 724 P.2d 412, 417 (1986). The Court should not consider an issue in the absence of adequate argument below. ***State v. Lazcano***, 188 Wn. App. 338, 355, 354 P.3d 233, 242 (2015), *as amended on reconsideration in part* (Aug. 20, 2015), *review denied*, 185 Wn.2d 1008, 366 P.3d 1245 (2016).

In this case, the record is devoid of what Stingray is, how it works, how it was used, etc. The Court should decline to hear this issue. Based on the limited record, this topic was explored, but it soon became clear to the trial court that Stingray was not used to locate the defendant and the issue was dropped.

To the extent that there is a record, the record is clear that the Stingray was not used to locate the defendant.

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[5] For example in a Federal Court case on this topic, the 7th Circuit Court of Appeals noted, "The record is painfully—indeed fatally—inadequate with respect to critical details about the way the Stingray was used. .... We know nothing about the way in which the Stingray used in Patrick's case was configured, nor do we know the extent of its surveillance capabilities." ***United States v. Patrick***, 842 F.3d 540, 546 (7th Cir. 2016)(Dissent).

ii. The defendant has presented no evidence, either in his direct appeal or in his consolidated personal restraint petition, to suggest that cell site simulator technology was used to apprehend him, and his arguments to the contrary are merely speculative.

The defendant in this case is asking this court to reverse the jury's verdicts in this case based on his pure speculation that cell site simulator technology, or "Stingray" technology, was used by law enforcement to apprehend him. The defendant asserts that "there is a high likelihood Olsen's cell phone was tracked along with thousands of others on February 18." BOA, page 32. No citation accompanies his claim. In other words, the defendant is asking this court to find that his cell phone was tracked by the police even though there is nothing in the record to support such a claim. Such speculation would be improper.

The State presented multiple affidavits indicating that Stingray technology was not used to locate the defendant. CP 303-309. The State also indicated that, while the detectives wanted to use the Stingray device in Spokane to look for the defendant, their request was denied. 6/29/15 RP 18. There are no facts before this court to support the speculative assertions that somehow the Stingray device was used on this defendant. As argued below, because the device was not used on the defendant, he has no standing to challenge it now.

iii. The trial court properly found that the defendant lacked standing.

The Court review issues of standing de novo. ***State v. Link***, 136 Wn. App. 685, 692, 150 P.3d 610, 614 (2007). When a defendant seeks to suppress evidence on privacy grounds and the State contests the defendant's standing, the defendant has the burden to establish that the search violated his own privacy rights. *Id.* (*citing* ***State v. Jacobs***, 101 Wn. App. 80, 87, 2 P.3d 974 (2000)). A claimant who has a legitimate expectation of privacy in the invaded place has standing to claim a privacy violation. *Id.* A two-part inquiry resolves a question of standing: (1) did the claimant manifest a subjective expectation of privacy in the object of the challenged search; and (2) does society recognize the expectation as reasonable? *Id.*

Fourth Amendment rights are personal rights that may not be vicariously asserted. ***State v. Jones***, 68 Wn. App. 843, 847, 845 P.2d 1358, 1360 (1993)(internal citations omitted). Thus, to establish a Fourth Amendment violation, one must demonstrate a personal and legitimate expectation of privacy in the area searched or property seized. Without such a showing, a criminal defendant cannot benefit from the exclusionary rule's protections because one cannot invoke the Fourth Amendment rights of others. *Id.* (*Citing* ***United States v. Salvucci***, 448 U.S. 83, 86–87, 100 S. Ct. 2547, 2550–2551, 65 L. Ed. 2d 619 (1980)).

The defendant cannot point to any actual invasion of his own privacy rights, so he relies on an argument that he has standing because law enforcement is tracking thousands or perhaps millions of cell phones. BOA at 33. The defendant also cites ***State v. Young***, 123 Wn.2d 173, 187-88, 867 P.2d 593 (1994), but ***Young*** is distinguishable because law enforcement actually used the thermal imaging at issue on Young's home and he had standing to contest the search.

iv. No evidence presented that was collected from a Stingray operation, and therefore nothing for the court to suppress.

Assuming arguendo that there is a sufficient record to review this issue, that he has standing to raise it and is was used on him, there is no evidence to suppress. The defendant asserts that the trial court should have suppressed both the evidence surrounding his arrest and the evidence collected from his person at the time of arrest as fruits of the poisonous tree. BOA at 33. Such remedy would be unwarranted in this case. First, as argued above, the defendant has not developed any evidence that cell site simulator technology was used to locate or apprehend him. On the contrary, the deputy prosecutor—an officer of the court—indicated that such technology was not used to locate or apprehend the defendant. 8/19/15 RP 10-13.

Second, assuming without conceding, that the Stingray device was improperly used to locate Nathan Stevenson and this then lead to the arrest of the defendant, the defendant himself cannot be the fruit of the poisonous tree. ***United States v. Crews***, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537 (1980) ("Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.). There is nothing to suppress and the remedy sought by the defendant is not proper.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REASONABLY RESTRICTING VOIR DIRE AFTER GIVING PARTIES ADEQUATE TIME TO QUESTION THE VENIRE.

A trial court's ruling regarding the scope and extent of voir dire is reviewed for an abuse of discretion. ***State v. Brady***, 116 Wn. App. 143, 146, 64 P.3d 1258, *review denied*, 150 Wn.2d 1035 (2004), *citing* ***State v. Davis***, 141 Wn.2d 798, 825-826, 10 P.3d 977 (2000). The scope and duration of voir dire examination is vested within the discretion of the trial court, which is afforded considerable latitude in its supervision of the voir dire process. ***State v. Robinson***, 75 Wn.2d 230, 231, 450 P.2d 180 (1969), *citing* ***State v. Tharp***, 42 Wn.2d 494, 256 P.2d 482 (1953). A trial court's

ruling limiting or curtailing the time allotted for voir dire will not be disturbed on appeal absent an abuse of discretion coupled with a showing that the defendant's rights were substantially prejudiced. ***State v. Davis***, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). Moreover, curtailment of voir dire will only warrant a new trial where the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. ***State v. Chanthabouly***, 164 Wn. App. 104, 140, 262 P.3d 144, *review denied*, 173 Wn.2d 1018 (2012), *citing* ***State v. Roberts***, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

In this case, the parties were initially given 40 minutes for general questioning, which occurred after lengthy individual questioning of 26 jurors for the majority of a day. CP 475-497; RP 351. Both parties were given the opportunity to address each juror. *Id.* Each party was then given 40 minutes of general questioning to the venire, with a second round of 15 minutes. CP 475-497; RP 351, 464. At the beginning of general questioning, the following exchange occurred:

The Court:	. . . Forty minutes each side to begin with. Does that sound reasonable?
Mr. Lewis (the State):	Your Honor, did you say 40 minutes?
The Court:	Forty, four zero.
Mr. Lewis:	Yes, Your Honor.
The Court:	Does that sound acceptable?
Mr. McNeish (defense):	Yes.

RP 351.

At the time of the initial discussion, defense counsel was agreeable to what the defense is now characterizing as a "wait and see" approach. BOA, page 37. At no point did defense express confusion, reluctance, or an objection to the court's plan. Rather, defense counsel agreed that it was acceptable.

The defense objected for the first time, following the initial 40 minute period, indicating that he needed a second round of 40 minutes. RP 464. The court indicated that for the second round, the State was requesting an additional five minutes, the defense was requesting an additional 40 minutes, and the court decided to give each side 15 more minutes. RP 464. The defense, as part of the objection, stated that he was not able to address the issue of police bias. RP 467. The State's response was that the issue of experiences with law enforcement was previously addressed by the State during their questioning. RP 468. The State also asserted that the defendant had not been prejudiced. *Id.*

The prospective jurors in this case were all given a lengthy questionnaire. CP 654-1482. The questionnaire consisted of 46 questions broken up into three sections—hardship, general, and case related questions. *Id.* The questions included questions about law enforcement. CP 654-1482. Moreover, the State questioned many of the jurors about law enforcement bias and/or bias by the criminal justice system. RP 368

(juror #1); RP 370 (juror #4); RP 373 (juror #6); RP 375 (juror #9); RP 376 (juror #11); RP 378 (juror #20); RP 380 (juror #22); RP 382 (juror #23); RP 383 (juror #25); RP 384 (juror #26); RP 386 (juror #35); RP 387 (juror #53); RP 389 (juror #65); RP 390 (juror #52); RP 392 (juror #55); RP 393 (juror #36).

The defendant relies on ***State v. Brady***, 116 Wn. App. 143, 64 P.3d 1258, *review denied*, 150 Wn.2d 1035 (2004). ***Brady***, however, is distinguishable from the present case. In ***Brady***, a case with four separate defendants, the court informed all parties that the State would have 45 minutes of voir dire and each defense attorney would have 30 minutes for their initial round of questioning. *Id.* at 145. The trial court specifically told all of the attorneys that they would have *two* chances to question the prospective jurors. *Id.* By the third day of voir dire, all of the attorneys had finished their first round of questioning. *Id.* at 146. The trial court determined that there was an inadequate amount of time remaining for the attorneys to have a second round of questioning and ordered the parties to begin selection of jurors. *Id.* This Court found that the trial court abused its discretion and held:

> The trial court has broad discretion over voir dire; it could vary the time allowed to each party, as it did here. *But the problem is the way the court changed the rules*. After designating the time it would allow each party, and after two parties had used the first part of their time, the court

> eliminated the promised second opportunity to talk with the jurors.

Id. (emphasis added)

In this case, the trial court did not change the rules. The trial court never promised either party a fixed number of rounds, nor did it specify how long each round would be. As noted above, defense counsel agreed with the court's approach of beginning with 40 minutes of voir dire per side without seeking clarification from the court as to how many more opportunities would be allowed. In ***Brady***, the court promised the parties one thing, and delivered another. In this case, the trial court made no such promises. As the court in ***Brady*** held, the trial court has broad discretion over voir dire and could vary the time allowed to each party, as it did here. This court should find that the trial court properly exercised its discretion in voir dire, and alternatively, because the issue of law enforcement bias was previously addressed, the defendant cannot show prejudice.

4. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED TO ESTABLISH THAT THE DEFENDANT COMMITTED MURDER IN THE SECOND DEGREE BY EXTREME INDIFFERENCE WHEN HE FIRED HIS WEAPON DOWN A CROWDED STREET, DURING THE EARLY EVENING, WHILE CHASING THE VICTIM AT A HIGH RATE OF SPEED, CAUSING OTHER MOTORISTS TO FEAR THAT THEY WERE GOING TO BE SHOT[6].

A defendant may be convicted of extreme indifference first degree murder when the State proves "beyond a reasonable doubt that [the defendant] (1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." ***State v. Yarbrough***, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009) *citing* ***State v. Pastrana***, 94 Wn. App. 463, 470, 972 P.2d 557, *review denied*, 138 Wn.2d 1007, 984 P.2d 1035 (1999), *overruled on other grounds by* ***State v. Henderson***, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015).

Evidence of a defendant firing a gun multiple times on a flat trajectory in a residential neighborhood from a motor vehicle is sufficient to support a conviction for extreme indifference murder. ***State v. Pettus***,

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[6] Due to the nature of the defendant's other assignments of error, the State agrees that he is entitled to raise a sufficiency of the evidence claim as to count II, which was vacated. If, however, this court finds that none of the defendant's other claims have merit, it could decline to address a sufficiency of the evidence argument as to count II as moot.

89 Wn. App. 688, 694, 951 P.2d 284 (1998), *overruled on other grounds* by ***State v. Henderson***, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015). The endangerment of multiple bystanders is sufficient to support an extreme indifference conviction even if a primary target was also endangered. *Id.*; *see also* ***State v. Pastrana***, 94 Wn. App. 463, 972 P.2d 557(1999), *overruled on other grounds* by ***State v. Henderson***, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015).

The test of sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 8.

In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses,

and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds* by ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

The defendants' actions in this case are similar to ***Yarbrough***, ***Pettus*** and ***Pastrana***. In ***Yarbrough*** and ***Pettus***, the defendants had a prior dispute with a particular individual and targeted that individual at a time and in a location where other people unrelated to the dispute were present. ***State v. Yarbrough***, 151 Wn. App. at 84. ***State v. Pettus***, 89 Wn. App. at 695. Likewise, here the defendant was after a specific target and was entirely indifferent to the location where he chose to engage him and to the innocent bystanders who would be endangered by the gunfire. RP 1088-1089, 1234, 1264, 1282, 1289, 1317, 1320.

In ***State v. Pettus***, *supra*, the defendant believed that the victim had "ripped them off." ***Pettus***, 89 Wn. App. 688 at 691. ***Pettus*** and his associate drove after the victim, catching up to him and pulling alongside his vehicle. *Id.* at 692. Pettus, armed with a .357 revolver, began firing at the victim, hitting the victim's vehicle and the victim himself. *Id.* The

victim died from his injuries. *Id.* Two shots passed nearby or through the windshield. *Id.* The court found that a reasonable jury could have found Pettus guilty of first degree murder by extreme indifference on the basis that Pettus fired a gun from a moving car numerous times while traveling through a residential neighborhood and near a school. *Id.* at 695. The court held that the gunshots placed people in the vicinity at grave risk of death. *Id.*

Similarly, in the case at bar, the defendant also fired a gun from a moving car while traveling down a populated street. Multiple witnesses were in the area. William Gamm testified that he was on Canyon Road headed home at the time of the incident. RP 1226. He stated there was a lot of traffic at the time of the incident. RP 1238. He observed other motorists pulling over to the right of the roadway. RP 1227. Gamm observed a small car heading towards him with the U-Haul truck in pursuit. RP 1228-1229. The truck, later determined to have been driven by the defendant, drove up onto the median between the north and southbound lanes of travel. RP 1229. The defendant had a pistol pointed at the car that was headed toward Mr. Gamm. RP 1230. Gamm was so concerned that he was going to get hit by the gunfire coming from the defendant that he got all the way down in his seat. RP 1232. Gamm stated that he was fearful for his life. RP 1234.

Caroline Benum stated that she and her husband were on Canyon Road at the time of the incident and that traffic was medium to heavy. RP 1256-1257. She saw the defendant's U-Haul giving chase to Ward's car. RP 1262. She heard gunshots coming from immediately behind her car. RP 1264. Robert Benum described the traffic as moderate. RP 1276. He described the incident as scary. RP 1282.

Mathew Hagadone and Lydia Dallah were also on Canyon Road. RP 1287. Hagadone described traffic in the area as heavy. RP 1288. At the time of the incident, vehicles were on either side of Hagadone's car. RP 1296. He heard gunshots. RP 1289. In response to the gunshots both he and Dallah ducked down. RP 1289, 1306. The gunshots appeared to be very close and loud. RP 1290.

Verne Yates was also on Canyon Road at the time of the incident. RP 1317. He saw a small car being pursued by a truck. RP 1320. Also in the immediate area was Ashlee Baker, who ended up driving Ricky Pederson home. RP 1088-1089.

Clearly, the defendant opened fire in a heavily populated area, causing fear to those in the immediate area that they, too, were going to get shot. By the defendant's own testimony, he fired a minimum of five separate times. RP 2135, 2143. When viewed in the light most favorable to the State, and in light of the wealth of uncontroverted evidence of

extreme indifference, this court should find that sufficient evidence was presented for a reasonable jury to have found the defendant guilty of murder in the first degree by extreme indifference.

5. THE TRIAL COURT PROPERLY EXCERCISED ITS DISCRETION IN ALLOWING THE PROPER IMPEACHMENT OF NICOLE CLARK AND EVEN IF THE COURT ERRED, ANY ERROR WAS HARMLESS BECAUSE THE DEFENDANT TESTIFIED THAT HE SHOT THE VICTIM.

a. Facts

During Detective Delgado's testimony, the State attempted to elicit testimony regarding Nicole Clark's statements to police. RP 1651. The State made the following argument to the court:

> Your Honor, pursuant to Evidence Rule 613, a witness can be impeached via the testimony of another witness by way of prior inconsistent statements. Ms. Clark has previously testified in this case in a manner that is contradictory to statements that she made to Detective Delgado at the time that he interviewed her in the course of her investigation. I'm simply seeking to elicit her prior inconsistent statements which were inconsistent with her testimony in this matter.

RP 1652.

The State asserted that during Clark's trial testimony, she testified that on the night of the incident at approximately 6:00 p.m., the defendant was with her at their apartment, and that she was awake at the time making dinner. RP 914, 1652. Clark rented the U-Haul truck at 2:07 p.m.

on February 16, 2014. RP 598. During her testimony, when asked if the defendant remained in the house after the 6:00 p.m. dinner, Clark stated that she thought so. RP 914. She asked if she had a recollection of the defendant leaving the apartment, she stated she did not know. RP 915. She indicated that she thought the defendant was with her for dinner. RP 914.

Clark was asked if she remembered being interviewed by Detectives Delgado and Laliberte previously. RP 916. Clark agreed that the interview occurred. *Id.* She was asked if she recalled telling the detectives that, following the rental of the U-Haul truck, she and the defendant were together for one to two hours before she went to rest in her bedroom. *Id.* Clark stated that she "might have said that." *Id.* When asked if she recalled telling detectives that she did not see the defendant from the time she went to her bedroom until 3:00 a.m. the following day, she stated, "Maybe my memory was a lot better then." *Id.*

In contrast, she reported to Detective Delgado that shortly after renting the U-Haul truck she went upstairs because she was not feeling well. RP 1653. She told Detective Delgado that she fell asleep and did not wake up again until 3:00 a.m. the following day. *Id.*

The court allowed testimony from Detective Delgado regarding Clark and the defendant's whereabouts at the time of the murder as proper

impeachment. RP 1654. Thereafter, Detective Delgado testified that after renting the truck, she and the defendant were together for one to two hours before she went to rest because she was not feeling well. RP 1657-1658. She reported to Detective Delgado that she did not get up from her rest until 3:00 a.m. the following day. RP 1658-1659.

b. Argument

Washington's appellate courts will only reverse a trial court's decision on whether to admit or exclude evidence when the ruling was an abuse of discretion. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (*citing* ***State v. Swan***, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); ***Reese v. Stroh***, 128 Wn.2d 300, 310, 907 P.2d 282 (1995)). A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. ***Thomas***, 150 Wn.2d at 856 (*citing* ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). This requires a showing that the trial court's evidentiary ruling was "manifestly unreasonable." ***State v. Hughes***, 118 Wn. App. 713, 724, 77 P.23d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004) (*citing* ***State v. Brown***, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). The unreasonableness is manifest when it is "obvious, directly observable, overt or not obscure...." *See generally* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

ER 613(b) provides:

> "A statement is not hearsay if—(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is … (ii) consistent with his testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]"

"Whether a prior statement is admissible under ER 801(d)(1)(ii) is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion. ***State v. Johnson***, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

In this case, Nicole Clark was able to provide details about many of the events surrounding the incident, but was unable to recall what time she went to bed or when she last saw the defendant on the day of the murder. In such case, impeachment by prior inconsistent statement is entirely proper. The record does not demonstrate any abuse of discretion.

Moreover, even if defendant could prove his claim of error it would not serve as a ground for reversal since it could not be construed as prejudicial. *See* ***State v. Cunningham***, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Nonconstitutional evidentiary error is not prejudicial unless, within reasonable probability, had the error not occurred, the outcome of the trial would have been materially affected. *See* ***Cunningham***, 93 Wn.2d at 831; *see also* ***State v. Halstien***, 122 Wn.2d 109, 127, 857 P.2d

270 (1993) (*citing* ***State v. Tharp***, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)); ***State v. Bargas***, 52 Wn. App. 700, 705, 763 P.2d 470, *review denied*, 112 Wn.2d 1005 (1988); ***State v. Stark***, 48 Wn. App. 245, 249-250, 738 P.2d 684 (1987); ***State v. Ellison***, 36 Wn. App. 564, 569, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984).

Defendant cannot prove that he was prejudiced by the admission of the challenged evidence. To the extent Clark's trial testimony was an attempt to alibi the defendant, her efforts were fruitless as the defendant himself admitted to shooting the victim. RP 2094. Because the defendant acknowledged his presence and his actions, a timeline provided by Clark was irrelevant, and therefore any potential error is harmless. Defendant has failed to prove the challenged ruling prejudiced the outcome of his trial.

6. THE DEFENDANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO RELIEF UNDER HIS PERSONAL RESTRAINT PETITION BECAUSE HE HAS NOT SHOWN THAT THIS ALLEGED "NEW EVIDENCE" WOULD HAVE CHANGED THE RESULT OF THE TRIAL, WOULD NOT BE IMPEACHING, AND HE HAS NOT MADE A PRIMA FACIE SHOWING TO ENTITLE HIM TO A REFERENCE HEARING.[7]

Personal restraint procedure has origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. A personal restraint petition, like a petition for writ of habeas corpus, is not a substitute for an appeal. ***In re Personal Restraint of Hagler***, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982). Collateral relief undermines finality of litigation, degrades the prominence of trial and sometimes costs society the right to punish admitted offenders. *Id.*; ***In re Personal Restraint of Woods***, 154 Wn.2d 400, 409, 114 P.3d 607 (2005), *overruled on other grounds by* ***Carey v. Musladen***, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). These costs require collateral relief to be limited in the state as well as federal courts. *Id.*

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[7] The appellate appears to be conceding that the issue of newly discovered evidence cannot be raised in a direct appeal, but must be raised in a personal restraint petition, where additional evidence can be presented. BOA, page 18, *see* ***State v. McFarland***, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) (matters outside the appellate record must be raised in a personal restraint petition). Because this appellant's direct appeal and personal restraint petition were consolidated by this court, the State is addressing this claim in the context of a personal restraint petition only, as that is the only vehicle for which such a claim can be properly addressed.

In this PRP, petitioner must show constitutional error resulted in actual prejudice. Mere assertions are insufficient to demonstrate actual prejudice. The rule constitutional errors must be proved harmless beyond a reasonable doubt has no application in PRPs. ***In re Personal Restraint of Mercer***, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); ***Hagler***, 97 Wn.2d at 825; ***Woods***, 154 Wn.2d 409. Petitioners must show "a fundamental defect which inherently results in a complete miscarriage of justice" to obtain relief from alleged nonconstitutional error. ***In re Personal Restraint of Cook***, 114 Wn.2d 802, 812 792 P.2d 506 (1990). This is a higher standard than actual prejudice. *Id.* at 810. Any inferences must be drawn in favor of the validity of the judgment and sentence and not against it. ***Hagler***, 97 Wn.2d at 825-826. "This threshold requirement is necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes the petitioner has had an opportunity to obtain judicial review by appeal." ***Woods***, 154 Wn.2d at 409.

The petition must include a statement of facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); ***In re Personal Restraint of Williams***, 111 Wn.2d 353, 759 P.2d 436 (1988). PRP claims must be supported by affidavits stating particular facts, certified documents,

certified transcripts, and the like. *Id.* at 364; *see also* ***In re Personal Restraint of Connick***, 144 Wn.2d 442, 451, 28 P.3d 729 (2001), *overruled on other grounds by* ***In re Personal Restraint of Goodwin***, 146 Wn.2d 861, 50 P.3d 618 (2002). If allegations are based on matters outside the existing record, the petitioner must demonstrate he has competent, admissible evidence to establish the facts entitling him to relief. *Id.* Reviewing courts have three options in evaluating personal restraint petitions:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
>
> 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
>
> 3. If the court is convinced a petitioner has proven actual prejudicial error arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the court should grant the personal restraint petition without remanding the cause for further hearing.

In re Personal Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). PRPs must be dismissed when they are not supported by adequate proof. ***Williams***, 111 Wn.2d at 364.

There are five mandatory requirements that must be met before newly discovered evidence will satisfy the exception: the evidence must (1) be such that it would probably change the result of the trial, (2) be discovered after the trial[8], (3) not have been discoverable before the trial through the exercise of due diligence, (4) be material and admissible, and (5) not be cumulative or impeaching. ***In re Personal Restraint of Faircloth***, 177 Wn. App. 161, 311 P.3d 47 (2013); ***In re Personal Restraint of Stenson***, 150 Wn.2d 207, 217, 76 P.3d 241 (2003). Absence of any of the five factors is sufficient to deny a new trial. *Id.* Recantation testimony is inherently questionable. ***State v. Macon***, 128 Wn.2d 784, 911 P.2d 1004 (1996).

a. Bryant's new statement would not change the result of the trial.

When considering whether "newly discovered evidence" will likely change the trial's outcome, factors include the credibility, significance, and cogency of the proffered evidence. *See* ***State v. Barry***, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980); ***State v. Castro***, 32 Wn. App. 559, 565-66, 648 P.2d 485, *review denied*, 98 Wn.2d 1007 (1982).

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[8] The State agrees that Bryant's new version of events was discovered after trial and that it could not have been discovered before trial, but the timing of Bryant's new statements only increases, rather than diminishes, the level of suspicion with which his statement should be viewed.

In this case, Bryant's trial testimony was consistent with that of the other surviving passenger in the same vehicle—Ricky Pederson. *See* RP 1110. At trial Bryant testified that he heard gunshots five to ten seconds after Ward accelerated out of the parking space. RP 1110-1111. Bryant testified that he heard a dozen shots and took cover. RP 1111. He described the defendant firing more shots on Canyon Road. RP 1113. He stated that no gunshots came from within Ward's car and that he never saw a gun. RP 1114. Similarly, Pederson described gunshots directed at Ward's vehicle very shortly after Ward placed the car into drive. RP 1158. He indicated that the defendant continued to fire on their car as they approached Canyon Road. *Id.* Pederson—who had the better vantage point as the front seat passenger—indicated that Ward pulled into oncoming traffic after being shot in the head, and that the gunfire continued. RP 1160. Pederson stated that Ward withdrew his gun but was prevented from raising it higher than his lap, because he got shot. RP 1162. Pederson stated that Ward never pointed his weapon.

Bryant's new version of events is not consistent with Pederson's testimony or that of the other witnesses who all described the defendant's vehicle as giving chase to Ward's. Ward's testimony, even if it had been given at trial, would not have changed the outcome of the trial given the

overwhelming evidence presented. His trial testimony was wholly consistent with the facts and with the testimony of the other witnesses.

The defendant relies on ***State v. Rolax***, 84 Wn.2d 836, 529 P.2d 1078 (1974), *overruled on other grounds by* ***Wright v. Morris***, 85 Wn.2d 899, 540 P.2d 893 (1975), and ***State v. Powell***, 51 Wn. 372, 98 P. 741 (1909), *overruled by* ***State v. Macon***, 128 Wn.2d 784 P.2d 1004 (1996). Both cases, however, are easily distinguishable from the current case. In ***Rolax***, the court held that it was unable to ascertain if there was any independent corroborative evidence upon which the conviction could rest. ***Rolax***, 84 Wn.2d 836 at 838. In ***Powell***, a case from 1909, the defendant was charged with rape—an offense that was committed in the presence of only the defendant and the victim. ***Powell***, 51 Wn. 372, 372-373. In the present case, as argued above, multiple witnesses testified consistently with Bryant's trial testimony, including the front seat passenger Pederson.

b. <u>The "newly discovered evidence" is not material and is only cumulative or impeaching.</u>

The new statement from Bryant would, in fact, be used for impeachment if the defendant were to be granted a new trial. Unlike other scenarios where an entirely new or unknown witness is discovered after the trial, in this case Bryant was a witness at trial and fully subjected to the adversarial process. He was cross examined by the defense and tested as

to his reliability. RP 1116-1120. If he were to testify in a new trial, his testimony would be impeached with one of his two versions of events.

c. The defendant has not made a prima facie showing that he would be entitled to a reference hearing.

In order to be granted to a reference hearing, the defendant must make a prima facie showing of actual prejudice. ***In re Personal Restraint of Rice***, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). Even if not meritless, a defendant may not be entitled to a reference hearing. *Id.* Instead, the defendant must have competent, admissible evidence that establish facts that entitle him to relief. *Id.* at 886; ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 18, 296 P.3d 872 (2013).

In this case, as argued above, the defendant cannot make a prima facie showing of actual prejudice. The statement of Bryant occurs after a verdict in which the defendant received a lengthy sentence. Bryant's new version of events should be looked at with great skepticism. At best, he has presented evidence with which to impeach Bryant should he be granted a new trial, not substantive evidence. Furthermore, the testimony that Bryant already offered was assessed by the jury, and comported with the testimony of the other witnesses, and was clearly deemed by the jury to be credible. If this court were to grant a reference hearing, the trial court would be placed in the position of having to determine which

version of Bryant's testimony is more credible—the one the jury believed or the current one. The defendant cannot establish a prima facie showing of prejudice and should therefore not be entitled to relief. He should not be granted a reference hearing.

7. THE DEFENDANT DID NOT PROPERLY RAISE THE ISSUE OF "ACTUAL CONFLICT" AS IT RELATES TO THE PROSECUTORS AND THE JUDGE INVOLVED IN HIS CASE, AS HE DID NOT PROVIDE ANY SUPPORTING DOCUMENTS AND THEREFORE THIS COURT SHOULD NOT CONSIDER SUCH A CLAIM.

To obtain relief in a personal restraint petition challenging a judgment and sentence, the petitioner must show (1) actual and substantial prejudice resulting from alleged constitutional errors, or, (2) a fundamental defect that inherently results in a miscarriage of justice in case of alleged non-constitutional error. ***In re Personal Restraint of Cook***, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). "After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence." *Id.* at 814, *citing* ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983). ***In re Personal Restraint of Borrero***, 161 Wn.2d 532, 536, 167 P. 3d 1106 (2007).

A personal restraint petitioner is required to provide "the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations. . . ." RAP 16.7(a)(2)(i). This requirement means that a "petitioner must state with particularity facts which, if proven, would entitle him to relief." ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not support the holding of a [reference] hearing." *Id.*; ***In re Cook***, 114 Wn.2d 802, 813–14, 792 P.2d 506 (1990) ("We emphasize that the quoted principle from ***Williams***, is mandatory; compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits.") *citing* ***In Re Personal Restraint of Williams***, 111 Wn.2d 353, 364–65, 759 P.2d 436 (1988).

The petition presently before the Court is not supported by evidence. The defendant asserts in his supplemental personal restraint petition that the victim in this case is somehow related to the Washington Attorney General's Office, and that the prosecutors and judge involved in his case were also somehow connected. Supplemental PRP, page 2-3. The defendant does not include any declarations or affidavits of facts. The petition may accurately be characterized as based on bald assertions and

conclusory allegations. The defendant also does not provide any argument for which the State could respond.[9] For lack of compliance with the basic requirements for this Court to consider his claim, the claim should be dismissed.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction and deny him relief on both his direct appeal and his personal restraint petition.

DATED: September 14, 2017.

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[9] "We reiterate our previous position: "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" ***State v. Johnson***, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (*citing* ***In re Personal Restraint of Rosier***, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (*quoting* ***United States v. Phillips***, 433 F.2d 1364, 1366 (8th Cir.1970))).

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The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.14.18 Theresa

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

September 14, 2017 - 11:48 AM

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